IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1042 OF 2006

In

SUMMONS FOR JUDGEMENT NO.686 OF 2005

In

SUMMARY SUIT NO.3577 OF 2004

Biochem Pharmaceuticals Industries & Anr. : Plaintiffs

V/s.

R.S.Thanawala : Defendant

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Mr.V.Z. Kankaria i/b. Mr.S.S.Deshmukh for the defendant in support.

Mr.Vicky Singh with Ms M. Joshi i/b. M/s.M & M Legal Venture for the plaintiffs to show cause.

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**CORAM : S.A.BOBDE, J.**

DATE : JANUARY 15, 2007.

**P.C**.

Heard.

2. The learned counsel for the plaintiffs raised a preliminary objection to the tenability of this Motion under Order IX Rule 13 of the C.P.C. He points out that on the strength of the judgement of the Supreme Court in

Rajni Kumar v. Suresh Kumar Malhotra [(2003) 5 SCC 315], such an application is under Order XXXVII Rule 4. More over, according to the learned counsel, such an application must demonstrate special circumstances for setting aside the order.

3. Mr.Kankaria, learned counsel for the applicant-defendant, submits that without entering into any dispute in the matter, this application be treated as one under Order XXXVII Rule 4 of the C.P.C. As regards the existence of special circumstances, the learned counsel points out two aspects. Firstly, according to Mr.Kankaria, in the letter written by the plaintiffs on 4.9.2002, the applicant has made a clear endorsement that he is willing to pay the amount on certain conditions. This could not be construed properly by the Court since the applicant had no opportunity to explain the contents. Moreover, according to the applicant-defendant, the affidavit-in-reply has been excluded from consideration on the ground that there was an office objection that running pages were not given. It is submitted that running pages are required by the rules where there are two applications which are of an original nature and, therefore, the affidavit at least could have been taken into account. Moreover, according to the applicant-defendant, none of these could be explained since the applicant’s Advocate

was held up before the 1st Court.

4. It is true that the details why the applicant could not appear before the Court when the matter was called out were not given, but having regard to the circumstances of the case set out above and the facts, I consider it appropriate, in the interest of justice, to treat the application as one under Order XXXVII Rule 4 and the circumstances set out as special circumstances. Moreover, it seems, having regard to the nature of the claim against the applicant, who appears to be a small trader, it would be appropriate in the interest of justice to set aside the order dated 6.3.2006 on the applicant-defendant paying a sum of Rs.10,000/- (Rupees Ten Thousand only) to the non-applicants/plaintiffs within a period of four weeks from today.

5. Notice of Motion stands disposed of.

S.A. BOBDE, J.